Contextual Determinism and Foreign Relations Federalism

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No doubt we are today trolling murky waters in matters involving the intersection of the domestic constitutional order and the global system. By way of evidence for the proposition, foreign relations law must now be counted among the hottest topics in the legal academy. The top law reviews in recent years have included many contributions in the area; indeed, one might venture that there have been more articles on foreign relations law subjects in the past five years than in the preceding twenty-five. Issues relating to the treaty power, the status of international law in our constitutional order, the role of the courts in resolving foreign relations controversies, and the role of the states on the international scene—all and more have been the subject of heated debate.

This interest can’t simply be explained in terms of Curtis Bradley, Jack Goldsmith, and others taking advantage of a ripe opportunity for some revisionist scholarship—although their energy in reexamining the canon of foreign relations law is certainly an important part of the story. One must, I think, also attribute the renewed interest in foreign relations law to the possible transformation of the international system and the advent of globalization. Foreign relations law is definitionally concerned with the intersection of the domestic and the international; it cannot be fully comprehended as an endogenous system. Its study must account for the global context to which it relates. And that presents a missing element in foreign relations law scholarship in general, most of which makes only passing reference to recent changes on the world scene.

In this respect, recent work on foreign relations federalism proves fairly typical. Much of it at least implicitly presumes the matter to be governed by the standard metrics of constitutional law, ones that consult the international context only incidentally. Thus, Michael Ramsey argues that the states should be afforded a

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greater role in foreign policymaking as a matter of original constitutional intent. Jack Goldsmith alleges a nineteenth and early twentieth-century tradition of such state activity to undermine the legitimacy of what he calls the “modern” rule barring it. The constitutional doctrine is argued both ways on its own terms, with Zscherneig, Barclays Bank, and now Crosby as flashpoints. Much analysis focuses on the respective institutional capacities of the courts and the political branches, discussion that tracks similar debates in the domestic constitutional arena.

In these treatments, the changed global context is given little more than a nod. Globalization emerges variously as a qualified concession—as something that cannot be ignored but which is at the same time played down as either clichéd or exaggerated—or as a sort of joker in the deck, a card that isn’t necessary to a winning argument but might add to the margin of persuasion. The nationalists tend to minimize its significance. On this battleground they are defenders of the doctrinal status quo; the transformation of international relations poses for them a natural


7. Compare Goldsmith, 83 Va L Rev at 1680–98 (cited in note 3) (arguing that courts are less well-equipped than Congress to police state activity that interferes with national foreign relations) with Spiro, 70 U Colo L Rev at 1253–59 (cited in note 3) and Swaine, 49 Duke L J at 1246–54 (cited in note 2) (both highlighting institutional reasons why Congress may not effectively perform this policing function).

8. See, for example, Swaine, 49 Duke L J at 1238 (cited in note 2) (stressing that the “much ballyhooed leap into globalization” presents continuation of earlier trends).
challenge to the established order rather than an element of the defense. The revisionists, by contrast, are of two minds on globalization’s significance. On the one hand, to the extent globalization gives cause to reexamine the conventional wisdom, it serves their purposes. On the other, they are uncomfortable with the fact of globalization and the deeper challenge it may pose to their restorationist objectives. On the matter of foreign relations federalism, revisionists appear to assume that constitutionally insulating state-level authority from federal control will also insulate it from international constraints. Acknowledging the magnitude of globalization threatens that premise.

That explains the continued marginalization of global context in recent scholarship. But it doesn’t justify it. To take Ed Swaine’s yardstick, it is only by reference to that context that we can “know what values lie in the balance.” Of course these values will be informed by some, but not all, of the background values grounding federalism in other contexts, and that may justify bringing to bear the usual analytical strategies. But the ultimate balance here, at least in the past, has been decisively determined by the structure of the international system. Thus, it is only by reference to the international system that one can explain why there has been a need to maintain the supremacy of federal policy. That value, and the “one voice” mantra associated with it, is a meaningless quantity when untethered from the international system. One cannot make sense of foreign relations federalism without that contextualization.

Such recognition as there is in the literature of globalization seems also to fall short in substantive characterization. The standard line of argument is that globalization has “blurred” the line between the domestic and the foreign. It’s an important point, so much so that it has almost instantly established itself as cliché (perhaps yet another reason why it is skipped over with little attention). But the observation bears further scrutiny. The line-blurring refrain reduces to an assertion of an intensified relationship between the local and the international; the local act now

9. See, for example, Goldsmith, 83 Va L Rev at 1670–80 (cited in note 3) (highlighting the “waning distinction between domestic and foreign affairs” as among the reasons for abandoning dormant foreign affairs power).

10. As Judith Resnik observes, those who support the Court’s new federalism jurisprudence see it as “fortify[ing] the United States against transnational norms because the current ‘logic’ of United States legal federalism contains the precept that, if a category of behavior is committed to state governance, then it cannot, by definition, be subject to international governance.” Judith Resnik, Categorical Federalism Gender, Jurisdiction and One Globe, 111 Yale L J (forthcoming 2001). See also Peter J. Spiro, The New Sovereignists, American Exceptionalism and Its False Pretexts, 79 Foreign Aff 9 (Nov/Dec 2000) (describing the revisionist premise that the United States can insulate itself from international norms and institutions).


12. See, for example, Jack Goldsmith, Statutory Foreign Affairs Preemption, 2000 S Ct Rev 175, 196 n 91 (noting that observation is now “standard in the literature”).
often has global implications, intentionally or not. States interact with foreigners; their laws are measured against international human rights; they seek to sell their products abroad and to attract foreign investment at home. Indeed, as Ernie Young notes, one can apply a Wickard-like analysis to every private economic act, so that the sale of a single grain of wheat, or whatever, now can be tied into the global dynamic. 11

But this may not represent a change of qualitative dimensions. State-level activity has frequently bumped up against international norms and actors. There is, for instance, a long line of episodes stretching back to the founding era in which state treatment of aliens in the realm of criminal, property, and estate law has given rise to international disputes under the international law doctrine of state responsibility. Modern human rights standards, it is true, also constrain a government’s treatment of its own citizens, but the expansion is firmly grounded in these longstanding norms. Even the Wickard proposition can be stretched back in time. The United States has never been an autarky; on the contrary, international trade has always been crucial to its prosperity. On the same terms that chaos theory has the butterfly in Brazil causing a tornado in Texas, then, the single economic act has always carried international significance.

Even assuming that line-blurring includes some qualitative change in how the local connects to the international, however, it is not clear which way this cuts for purposes of state activity implicating foreign relations. On the one hand, as the revisionists argue, if all state-level decisionmaking has international implications, the states can hardly be excluded from such activity. The revisionists throw up their hands, in effect, asserting that if everything domestic is also international, then the usual federalism regime should apply in which states should be able to do as they please except where the federal political branches tell them otherwise. 14 The nationalists argue, by contrast, that globalization undercuts federalism’s experimentation rationale, 15 and that those few activities with detrimental effects on national foreign relations can be judicially sorted from the greater part of benign

13. See Young, 69 Geo Wash L Rev at 179 (cited in note 6) (“Mr. Filburn’s consumption of his own crop, for example, would affect the price of wheat not only in Omaha, but potentially in Frankfurt as well.”).

14. See, for example, id at 181 (cited in note 6) (“if we cannot define an area of exclusive federal power by reference to these [foreign relations] concerns . . . then the whole enterprise of an exclusive federal ‘foreign affairs’ seems questionable”); Goldsmith, 2000 S Ct Rev at 197 (cited in note 12) (with respect to preemption, “[i]f a federal statute simultaneously implicates foreign affairs and a traditional state prerogative, the canons suggest that the Constitution creates both a presumption for and against preemption, which is nonsense”).

15. See, for example, Swaine, 2 Chi J Intl L at 346 (cited in note 1) (“if state policies become proportionately more occupied with external relations, the diversity of their local determinants dwindles”).
As a debate taken on its terms, I tend to agree with the nationalists on these points. This is how foreign relations federalism has operated for two centuries. When it comes to clear norms of international law, the laboratory argument for state discretion does not amount to much; and the fact is that only a few episodes—even in globalization's wake—have had the sort of harmful effect on foreign relations against which the doctrine has always been directed.

So much for line-blurring. By itself, it doesn't change the context in a way that demands change in the doctrine. But globalization amounts to more than this; it poses the possibility of an architectural change in the way nations deal with each other and their subdivisions. The crucial switch is found in notions of international responsibility. In the past, national governments were, as a matter of law and practice, held responsible for the misdeeds of subnational authorities. That made sense in a world of diverse governance systems, for it would have involved high transaction costs for each state to understand varying allocations of authority within other states, especially where contact with subnational authorities was episodic. It would also have been difficult to hold subnational authorities accountable for their wrongs, in any concrete fashion, where episodic contacts did not entrench remedial mechanisms.

Take the late nineteenth century example of Louisiana's failure to afford adequate protection (as required by international law) to Italian nationals from mob violence. Even assuming that Italy understood American federalism and the general autonomy afforded states in matters involving local law enforcement, it would have been difficult for Italy to have sought a remedy directly from Louisiana, in the absence of established communication channels and leverage points. Remedial entreaties, and the threat of retaliation, were more efficiently directed against Washington, and that efficiency was reflected in international law doctrines under which Italy could respond against the United States as a whole for the misdeeds of the component part. This context dictated the rule against state-level interference with foreign relations; the externalities of state action were too great to tolerate in a fragile international environment.

But globalization shifts the balance. International actors, for the most part, do now understand the internal workings of other nations. They have regular contact with subnational authorities, and, perhaps most importantly, they have gained leverage over subnational entities. In the face of globalization, international economic

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16. See Spiro, 70 U Colo L Rev at 1255-58 (cited in note 3) (asserting that courts have demonstrated an institutional competency in determining whether state measures interfere with foreign relations).
17. With respect, for instance, to the application of the death penalty, if one were to accept the laboratory argument in that context, one would have to accept the same argument with respect to torture and other universally accepted human rights. Other international norms implicate inter-jurisdictional relations, where an experimentation rationale would fail in the same way that it does with respect to the Commerce Clause.
competitiveness is critical to local economic prosperity. The threat of lost foreign investment or lost global sales offers the possibility of effective direct remedial action against subnational jurisdictions. If these direct remedial channels become entrenched, national-level responsibility may become redundant or obsolete. In that context, the subnational activity no longer poses a risk of interfering with national policy, and there is no need to depart from the federalism construct that governs other areas of regulation.

Of course, the “if” here is a significant one. Although the institutional logic of what I call targeted retaliation seems powerful, and recent developments suggest its viability and possible emergence, I cannot pretend to say that this responsibility regime is firmly in place. This, and not the timidity of the Supreme Court, explains the murkiness of these waters. We are witnessing some great changes in the international system, that are only now beginning to take shape. To the extent that the constitutional allocation of foreign affairs power is contingent on the contours of the international system and of its treatment of subnational actors, it too will remain in flux until the new landscape comes into better focus.

In the meantime, nothing the Supreme Court gives us will settle the matter. The Court is probably a lagging indicator on such matters, fearful (as it tends to be) of making missteps on foreign relations questions. Crosby is in that sense a time-bider, a ruling that allows for future flexibility, either in reaffirming the differential federalism rules that apply to foreign relations or in charting a path towards the differential's elimination. In the meantime, the political branches will probably provide earlier and more significant evidence on the evolution of constitutional norms in the area. One indicator will be the fashioning of future federal sanctions regimes in Crosby's wake. If sanctions measures come to include boilerplate savings provisions expressly approving subfederal action, that would effectively nullify Crosby and signal a shift towards greater constitutional toleration of such activity. Another is the emerging practice of what Ed Swaine calls “informed consent,” under which federal authorities are increasingly solicitous of state interests in the fashioning of federal foreign policy. Although that practice concerns federal policy, it is consistent with the recognition of

19. See, for example, Goldsmith, 83 Va L Rev at 1679 n 253 (cited in note 3) (questioning targeted retaliation thesis); Swaine, 49 Duke L J at 1240–41 (cited in note 2) (“Although cases of targeted retaliation are not unknown, it is hard to find examples demonstrating its sufficiency.”).
22. Swaine, 2 Chi J Intl L at 351 (cited in note 1).
significant state interests in international policymaking and with expanded state discretion in the area.\textsuperscript{23}

So too we should continue exploring other issues of foreign relations law. Because it is an area in which the courts are secondary players, scholars can assume a greater role as agents of change and of clarification than in other fields. In that light, the current academic focus on the foreign relations law canon takes on an added importance, for it is not of academic interest only. Ultimately, however, the international context will dictate the Constitution’s new take on these old issues.

\textsuperscript{23} Acceptance of Swaine’s suggestion that states inform the federal government of activity affecting foreign relations would evidence a continuing constitutional wariness, see id at 351–52, but I think this proposal so unlikely as to be almost implausible. That implausibility may itself highlight the trend line on the question toward greater constitutional tolerance of direct state participation in global affairs.